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Review of "Workable Competition and Anti-Trust Policy," By George W. Stocking

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BOOK REVIEW

WORKABLE COMPETITION AND ANTI-TRUST POLICY. By George W. Stocking, Nashville: Vanderbilt University Press. 1961. Pp. vii, 423. $7.50.

This book consists of a series of ten articles by Professor George W. Stocking, Research Professor of Economics and Director of the Institute of Research in the Social Sciences of Vanderbilt University. The articles were published separately in various professional journals between April, 1953, and March, 1959. Little editing is reflected by the compilation, and the publication of them at this time seems to have the purpose only of making them more fully available. The nature of their publication at intervals and the chronological arrangement in this book necessarily lead to considerable repetition and to presentation of the author's theses in a disjointed and ineffective way. In fact, the author has noted in his Preface that when he began to transform the articles into a book, he found himself writing a new one, "The Evolution of Federal Anti-Trust Policy" to be published soon. The content of the individual articles has, nevertheless, substantial value, and Dr. Stocking's new book should be of great interest to economists, lawyers and others interested in the fundamental aspects of the anti-trust laws.

Dr. Stocking points out that through the merger movements of 1897 to 1904, 1925 to 1929 and 1949 to 1959 (and since?), our business structure has become largely oligopolistic and that the nation's anti-trust policy makers face a real dilemma—one posed by economist Edward Chamberlin, who theorized in 1933 that if informed and rational oligopolists take account of the indirect, as well as direct, consequences of their business decisions, they will, without conspiring, behave the same as though there was a monopolistic agreement between them. If so, can our present anti-trust laws be effective?

The theory of "workable competition" has grown up as a concomitant to the Chamberlin theory. Originally posed about 1940 by economist John Maurice Clark, it has been modified and developed by others, and as generally now stated it is that: pure competition exists only in theory; nearly all business markets contain elements of both competition and monopoly; public policy should be directed toward the maintenance of "effective" competition rather than "free" competition; an industry has "effective competition" or "workable competition" when the market arrangements are more advantageous to the general public than any practically attainable alternative; such conditions exist when market forces provide the drive for technological innovation, economic allocation of resources, organization of

production and distribution of income. There is general agreement among the proponents that the criteria for judging whether an industry is workably competitive are its structure (number and size of firms), the practices or behavior of its member firms (*e.g.* have they been engaged in predatory pricing) and the record of performance of the industry as a whole (efficient, dynamic or static). There is, naturally, considerable difference even among the proponents over the emphasis to be placed on each such criteria. Obviously, such proposals raise many serious questions—*e.g.*, how to establish objective standards; how to confine administrative or judicial inquiries within practical limits. The concept, nevertheless, has been enthusiatically espoused by many lawyers as well as by economists and businessmen, and it has been made a factor in pressures for changes in the content and enforcement of our anti-trust laws. The Business Advisory Council of the Department of Commerce, for example, has recommended that the concept of workable competition "under a rule of reason" be adopted as a standard of legality.

Dr. Stocking approaches the concept with caution, concluding that there is considerable merit in many such proposals, but fearing that the net result would be the emasculation of the anti-trust laws. He points out that the concept is, or can be, part of a continuing attempt to reduce the effectiveness of anti-trust enforcement by reducing the scope of the *per se* violation doctrine and by expanding that of the Rule of Reason. He points out that what the Business Advisory Council is urging us to do is to amend the laws so as to be more consistent with the present day structure of the economy and business practices, rather than to cause industry structure and business practices to conform to what has been the law for many decades. Apt at turning a phrase, Dr. Stocking points out that the concept is welcomed by those who "regard big business as one of the noblest achievements of this era"[1] and comments that "economists, administrators, and judges are alike in their desire to make peace with their environment"[2]—i.e., to accept the oligopolistic, highly concentrated, big business, economic structure that has been developed rather than to struggle against it—and that as a result the concept of workable competition is fast becoming an anti-trust standard. He warns that full acceptance of the status quo may, however, so rigidify our economic structure as to render it incapable of adjusting to meet the social and economic developments ahead.

Of course, many of the differences among anti-trust men on these questions are matters of emphasis. The standard legal approach has been to base judgment, even on the issue of monopoly, largely on the

1. STOCKING, WORKABLE COMPETITION AND ANTI-TRUST POLICY 383 (1961).
2. *Id.* at 368.

conduct of the business firms, though of course, doing so against the backdrop of the industry's structure. There has been a trend of thought that bigness is itself bad.[3] The devotees of workable competition represent the counter-thought, extremely strong at this moment, to the effect that *any* anti-trust problem should call for a complete analysis of all relevant economic factors, culminating in a determination of whether the industry is workably competitive. An industry could be workably competitive in spite of any one factor—in spite of the small number of firms, their comparative size, whether they use artificial pricing methods—if the total picture is considered socially acceptable. The "per se" doctrine would be eliminated; there would be no "hard core" violations.

To lawyers primarily concerned with questions usually involved in civil litigation (whether a client or its competitor conspired to fix prices or to allocate markets, or attempted to reduce competition by driving competitors out of business, or gave or received discriminatory prices) these are highly esoteric questions. Furthermore, they would introduce infinitely more vagueness and uncertainty in a field of law already fraught with it and would make the lawyer's job of counseling almost impossible. Nevertheless, these issues underlie all anti-trust law and a study of them should be basic to the anti-trust lawyer.

In this series of articles Dr. Stocking discusses the concept in many contexts. Among the most interesting and valuable are the articles applying it to the court decisions involving trade association activities, to the judicially developed tests of what is monopoly, to the concept of the relevant market and to the decision in the *DuPont-General Motors* case.

Interestingly enough, as Dr. Stocking would apply the concept, many decisions that were rendered in favor of the business units involved would be decided against them.[4]

Dr. Stocking's article on the Attorney General's Committee Report is especially valuable. He is critical of the Committee's failure to analyze the fundamental aspects of the anti-trust laws, particularly the problem of bigness, of the Committee's acceptance of theories that would weaken enforcement of the laws and of the Committee's failure to pinpoint significant differences that existed within the Committee to such an extent that reference is necessary to a privately printed dissent to become aware of them.

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3. United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).

4. See *e.g.*, the chapter "The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities," in STOCKING, *op. cit. supra* note 1, at 18 *et seq.*

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